Supreme Court, U.S.
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No. 01-1420

IN THE

Supreme Court of the United States

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, *et al.*,

Petitioners,

v.

GUARDIANSHIP ESTATE OF DANNY KEFFELER, by WANDA PIERCE, Guardian, and other persons similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

Whether the Washington Department of Social and Health Services is obligated when it receives a Social Security benefit payment on behalf of a child in its care to expend those funds for that child's exclusive use and benefit and in the best interest of that child, in accordance with § 405(j), or may instead use the benefit payment to reimburse itself for the cost of services provided to the child under a separately funded program, without regard to whether the reimbursement payment is in the best interest of the child.

Whether the Washington Department of Social and Health Services' cost recovery program, which assigns future Social Security benefits to repay state foster care expenditures and subjects the benefits to a legal process with the same objective as a levy, execution, garnishment or attachment, violates § 407(a) of the Social Security Act.

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STATEMENT

A. INTRODUCTION

As stated by Petitioners, the question presented is whether a representative payee violates the anti-alienation provisions of § 407(a) of the Social Security Act when it uses Social Security benefits to pay for current maintenance of the beneficiary. The answer to this question is "no" where a properly appointed representative payee exercises discretion in the beneficiary's best interest to pay for the current maintenance needs of the beneficiary. The Washington Supreme Court expressly acknowledged that the use of Social Security benefits "for the care and maintenance of the beneficiary, as required under 20 C.F.R. § 404.2035(a), would indeed be in the best interest of the beneficiary." (Pet. App. 28.)

The Washington Supreme Court, however, went on to say:

> but that is significantly different from using [the benefits] to reimburse the state for payments it made for the care and maintenance of the foster child – especially when that payment to the state cannot be legally compelled and, moreover, could be used or conserved for other special needs of the child.

(*Id.*) Petitioner contended below that its use of the Social Security benefits entrusted to it to reimburse state foster care costs was permitted because it was merely acting as a representative payee and expending the funds to pay current maintenance. The Washington Supreme Court accepted the legal principle that representative payees could make such use of the funds, but rejected as a factual matter Petitioner's contentions that its reimbursement scheme used the funds to pay current maintenance and was in the child's best interest.

The Washington Supreme Court determined that Washington's Department of Social and Health Services ("DSHS" or the "Department") was a representative payee in name only and that its statutory and regulatory structure and

practice was that of a creditor engaged in a cost recovery program in violation of both the anti-alienation provisions of § 407(a) of the Social Security Act and the obligations of a representative payee under § 405(j) of that Act. Longstanding rules and regulations of the Social Security Administration ("SSA") prohibit self-dealing by representative payees and emphasize that representative payees must administer the funds entrusted to them for the exclusive use and benefit and in the best interest of the beneficiary. Using the funds to reimburse a debt, or indeed to make any other payment, whether for current maintenance or otherwise, without regard to the best interest of the beneficiary is prohibited. Use of future assignments, confiscation, liens, or any other legal process by a creditor to get access to Social Security benefits, other than those offered as an expenditure made in the best interest of the beneficiary is also prohibited. The conduct of DSHS violated these prohibitions, and the Washington Supreme Court's decision rightly requires it to conform its conduct to that required by federal law. Its decision should be affirmed.

B. BACKGROUND

Danny Keffeler, now a college graduate, was an orphan in foster care in the State of Washington when this controversy arose. SSA initiated this dispute when it removed Danny's grandmother, Wanda Pierce, as his representative payee and substituted DSHS so that DSHS could use Danny's Social Security funds to reimburse foster care costs. Ms. Pierce ultimately won reinstatement after two separate Social Security Administrative Law Judges ruled that she had appropriately refused the State's demands for reimbursement of foster care costs. This class action to recover Social Security benefits wrongfully confiscated from Danny and other children in foster care ensued.

1. Respondent Class

Respondents are children in foster care who receive Social Security benefits that are paid to Washington as their representative payee. They comprise approximately 14% of the children in Washington's foster care system. The children receive two distinct types of Social Security benefits. Thirty-two percent receive benefits under Title II of the Social Security Act ("Title II" or "survivor benefits") and approximately 62% receive Supplemental Security Income ("SSI") benefits under Title XVI of the Act. Approximately 6% receive both Title II and SSI benefits. (Pet. App. 49 ¶ 7.) Although the amount received by children receiving Title II depends on their parent's benefit eligibility and varies widely, the average benefit payment to children in Washington's foster care system was about $250 per month in 2000. (Pet. App. 50 ¶ 10.) On average, foster care children receiving SSI in Washington received $505 to $520 per month in 2000. (Pet. App. 50 ¶ 10.)[1]

2. Washington State's Foster Care Program

Through DSHS, Washington provides foster care to "runaway, dependent, or neglected children." Wash. Rev. Code § 74.13.031. So that it can receive federal funding, Washington executes its foster care program in accordance with a plan approved by the Social Security Administration.

To meet its state and federal law obligations, DSHS's Children's Division ("Children's Division") recruits foster parents. Foster parents are required to provide food, clothing, shelter, and supervision and to obtain health care as needed for

1. SSI benefits are subject to a $2,000 resource limit. A child may have a "supplemental needs trust" with a spendthrift provision, however, that will allow a child's resources to exceed the $2,000 limit without threatening his eligibility. *Horowitz* v. *Apfel*, 143 F. Supp. 2d 240, 242 (E.D.N.Y. 2001). No such limitation applies to SSA benefits.

the children in their care. Wash. Rev. Code § 74.13.330; Wash. Admin. Code § 388-25-0090. At the end of each month, the State provides the foster parent with a stipend that is intended to partially reimburse the cost of providing this care. The amount of the foster care stipend is fixed and depends only on the age of the child. Wash. Admin. Code § 388-25-0120. The foster care family receives the same amount no matter how much it actually spends for the child's care. For example, the foster parent of an eight-year-old child receives a reimbursement stipend of $426/month. (Pet. App. 90.)[2]

3. Foster Care Funding

Washington's foster care program is funded through a combination of state and federal funds. Washington receives federal foster care funding primarily through Title IV-E

2. The stipend reimburses the foster family for only a portion of the true cost of providing care for the child. Congress has set the minimum income standard for a disabled child receiving SSI benefits at $715/month, almost 70% more than Washington provides to that same child. 20 C.F.R. § 416.110; 66 Fed. Reg. 10695 – 10697 (Feb. 16, 2001). The United States Department of Agriculture reports that two-parent, two-child households with a median annual income of $23,800 in 2000 spent $543 per month in direct expenditures for an 8-year-old; those with a median income of $50,600 spent $749 per month. *2000 Expenditures on Children by Families, 2000 Annual Report, U.S. Department of Agriculture, Center for Nutrition Policy and Promotion Misc. Pub. No. 1528-2000.*

DSHS implies throughout its brief that foster care provides everything a child might need and that it will not be able to find enough things on which to responsibly expend the Social Security benefits if it is not permitted to use them for reimbursement. This assertion in belied by the judicial condemnations of Washington's foster care system, which include, for example, the finding that Washington fails to provide timely mental health assessments for children in foster care or to follow recommended treatment plans. *See Braam* v. *Washington DSHS*, No. 98-2-01570-1, Whatcom County Superior Court Injunction Order (May 31, 2002). (J.A. 548.)

(the federal foster care program).[3] Title IV-E funds provided approximately 18% of Washington's total state foster care budget for fiscal 2000. (Pet. App. 70 ¶ 85.)[4] Title IV-E is an uncapped, open-ended entitlement program that reimburses eligible state programs,[5] such as Washington's, for a portion of the cost of placing children in foster care or finding adoptive homes for special needs children.[6]

Excluding Social Security benefits, over 29% of the amount Washington expends for foster care each year comes from federal funding sources. (Pet. App. 70 ¶ 85.) When Social Security benefits taken as reimbursements are taken into account, the overall federal funding of Washington's foster care program

3. The Title IV-E program was created as part of the Social Security Act by the Adoption Assistance and Child Welfare Act of 1980 ("AACWA"), Pub. L. No. 96-272, 94 Stat. 500 (1980), codified at 42 U.S.C. §§ 670-74. Additional federal funding of foster care is provided through Title XIX (Medicaid); Title IV-B subpart 2 (the Family Support and Family Preservation Services program) of the Social Security Act; and 45 C.F.R. parts 98 and 99 (the Child Care and Development Block Grant).

4. The figure for the amount of Title XIX (Medicaid) funding should be $2,614,114. (*See* Exhibit F to the Findings of Fact, Pet. App. 109.)

5. To be eligible, a state plan must meet an extensive list of statutory criteria and must be approved by the Secretary of Health, Education, and Welfare. 42 U.S.C. §§ 671-72.

6. Title IV-E provides the following matching funds: foster care maintenance payments and adoption assistance payments, 51.83% (fiscal 2000); costs of social worker training, 75%; costs of foster parent or adoptive parent training, including travel and related expenses, 75%; certain expenditures for the planning, design, development, or installation of statewide mechanized data collection and information retrieval systems, and costs associated with the operation of such systems, 50%; other child placement services and other administrative expenditures, 50%; and foster care independence program costs, to the extent they exceed related penalties, 80%.

increases from 29% to just over 42%. (Pet. App. 50 ¶ 11; 70 ¶ 85.) Alone, the Social Security benefits taken by the State as reimbursement for foster care fund nearly 13% of the State's foster care budget.

In addition to federal funds, Washington also receives child support payments from parents of some children in foster care. In 2000 Washington forecasted it would collect approximately $3.24 million in payments from the parents of children in foster care. (Pet. App. 70 ¶ 84.)

4. DSHS's Cost Recovery Program

By statute and implementing regulations, Washington mandates that the Social Security benefits it receives as representative payee be used virtually exclusively to reimburse state foster care costs. DSHS is authorized under § 74.13.060 of the Revised Code of Washington to take custody of foster children's Social Security benefits and to disburse them to meet the child's personal needs or apply them "as reimbursement . . . against the amount of public assistance expended on behalf of [the child]." The DSHS regulation requires that the first priority use of the funds must be the repayment of public assistance:

> If a child in foster care is entitled to financial benefits, the income received *shall* be used on behalf of the child to help pay for the cost of the foster care received.

Wash. Admin. Code § 388-70-069, *repealed by* Wash. St. Reg. 01-08-047 (Apr. 30, 2001).[7] "Income" expressly includes any

7. While this action was pending before the Washington Supreme Court (after oral argument, but before an opinion issued) DSHS replaced this regulation with Washington Administrative Code section 388-25-0210 which provides: "The department *must* use income not exempted to cover the child's cost of care. . . ." (emphasis added.)

SSI or Title II benefits the child receives. The regulation further compels any person or agency that receives Social Security benefits on behalf of a child in foster care to remit those funds to the office of support enforcement. *Id.*

Pursuant to this statute and regulation, DSHS deposits the Social Security benefits it receives on behalf of children in foster care into a single "Foster Care Trust Fund Account" at the Office of the State Treasurer. (Pet. App. 52 ¶ 17.) The Trust Fund Unit of DSHS establishes a paper "subsidiary account" for each child. (Pet. App. 54 ¶ 20.) The child's account is "credited" each month when SSI or SSA benefits are deposited into the pooled Trust Fund Unit account. The child's account is "debited" each month when payments are paid from the pooled account to Children's Division. (Pet. App. 56 ¶ 28.) To determine the amount to debit from a child's account, the Trust Fund Unit accesses Children's Division's computer-generated list of "reimbursable foster care expenses" and pays Children's Division up to the full amount of the benefit received in a given month. (Pet. App. 56 ¶29.)

Any remaining balances are carried over and are subject to intermittent account sweeps. (Pet. App. 63 ¶ 58.) Account sweeps, which can debit a single account of thousands of dollars in a given day, take all of the Social Security funds that have accumulated to that date and apply them to all of the State's accumulated reimbursable foster care expenses. (Pet. App. 63 ¶ 58; 69 ¶ 82.)

The monthly reimbursement stipend paid to foster care parents is only one of the charges that Children's Division charges to a child's trust fund account as a reimbursable foster care expense. As services are provided to a child, Children's Division enters codes on that child's account indicating how much the child should be charged for that service. The service codes that can be charged to the child's Social Security benefits

are identified on a "T-Payment Code List."[8] (J.A. 404-05 & Ex. A hereto.) Many of the codes include a wide variety of services. For example, Service Code #3210 includes charges for "basic rate for room, board, clothing, and personal incidentals," as well as programmatic expenses such as "placement and counseling," and "case management services." (J.A. 420.) Children's Division also requires reimbursement for transportation costs and associated expenses for family counseling (Code #3233); private agency foster care, including case management services (Code #3211); arranging for and making payment to a psychologist or other qualified person for an evaluation of a child, parent, or foster parent, including preparation of written reports and case consultation (Codes #3232 and #3235); and caseworker transportation costs (Codes #3233 and #3234).[9]

In reliance on this cost recovery program, DSHS's budget "includes as part of its revenue sources, SSA and SSI payments anticipated to be received by DSHS as representative payee." (Pet. App. 55 ¶ 22.) These anticipated revenues reduce the amount the state legislature is required to appropriate to DSHS. (Pet. App. 55 ¶ 23.) Because 100% of the benefits are allocated in advance of receipt for foster care reimbursement, social workers who would like to use a child's Social Security benefits

8. The DSHS Service Code Manual ("SSPS Manual") describes the services that may be charged under each code number. (J.A. 407, 471.) The Washington Supreme Court was able to determine which programmatic expenses were subject to payment from Social Security benefits by comparing the State T-list (J.A. 404-05), with the service code descriptions indicated in the SSPS Manual. (J.A. 407, 471.) The T-list in the Joint Appendix at 404-06 inadvertently omits some columns of identifying code numbers. An accurate copy of the T-list is attached as Exhibit A to this Brief.

9. The record does not reveal how DSHS determines how much a child's account should be assessed for services provided by DSHS's own staff, such as social worker visits, setting up counseling appointments, and preparing written reports.

to pay for items needed by the child must request and justify a "waiver of reimbursement" from the DSHS Trust Fund Unit. Waiver requests are granted in the discretion of the Trust Fund Unit. (Pet. App. 57 ¶¶ 30-33.) Only upon approval of a waiver can a child's benefit payments be used for any purpose other than cost recovery.

A ten-year review of a random sample of 48 accounts of children in foster care showed that waivers are seldom requested or authorized.[10] In the sampled accounts, only 3% of the Social Security benefits were used for any purpose other than cost recovery. (Pet. App. 60 ¶ 47.)

The State representative payee has no regular, systematic program to determine what "extra items" or "special needs" would directly benefit the children. (Pet. App. 59 ¶ 41.) The children and foster care providers are not told that the benefits are available. (Pet. App. 59 ¶ 40.) The Secretary of DSHS has not issued written instructions or guidelines to establish when and if special needs and extra items and savings should be requested or approved. (Pet. App. 58 ¶ 38.)

The trial court found that DSHS fails to account for parental support before it seeks reimbursement for services to a child. This failure allows DSHS to receive double repayment of the same expenses, recovering costs from both a support paying parent and again from the child's Social Security benefit. (Pet. App. 68 ¶ 77; 70 ¶ 84.) The State has been aware of this "double-dipping" at least since 1994 but has failed to implement any corrective measures. (Pet. App. 69 ¶ 81.) A similar failing

10. The review of the random samples was conducted by the parties as part of the discovery process initiated in response to the Washington Supreme Court's remand order. *See infra* p. 12; (Pet. App. 46-111.)

allows DSHS to obtain reimbursement for costs that were paid by the Federal government. (Pet. App. 70 ¶ 85; 70-71 ¶ 88.)[11]

C. ADMINISTRATIVE PROCEEDINGS

In July 1990, Danny Keffeler entered Washington's foster care system. Danny's mother died two months later, making him eligible for Title II (survivor) benefits. Danny's grandmother, Wanda Pierce, although unable to take custody of Danny, was appointed guardian of Danny's estate. She applied for Title II benefits for Danny and began receiving them as Danny's representative payee, pursuant to 42 U.S.C. § 405(j). Ms. Pierce administered the benefits through a state guardianship proceeding. She expended some funds to provide for current maintenance not provided by the foster care program and conserved the remainder to pay for college.

In April 1991, SSA notified Ms. Pierce that it was removing her as Danny's representative payee and naming instead the DSHS Trust Fund Unit. Ms. Pierce successfully appealed to the Social Security Office of Hearings and Appeals, which ordered that she be reinstated as Danny's representative payee in January 1993.[12]

In February 1994, DSHS launched a two-pronged attack on Ms. Pierce as Danny's representative payee. First, it filed a creditor's claim against the Guardianship Estate and filed a show cause order why the guardianship should not be required to assign the SSA checks to the DSHS Trust Fund, why Ms. Pierce should not be removed as guardian of the estate, and why Ms. Pierce should not be required to pay all previously received

11. The State argued that it passed this cost recovery back to the Federal government but provided no evidence of such repayment. (Pet. App. 70-71 ¶ 88.)

12. DSHS received approximately $5,000 of Danny's Social Security benefits while the appeal was pending.

and conserved Social Security funds to the Trust Fund. Contemporaneously, DSHS again applied to be Danny's representative payee and requested a rehearing of the Hearings and Appeals Decision by the Appeals Council. Danny's benefits were suspended while the matter was on appeal. DSHS dismissed its state court claim after Danny asserted that 42 U.S.C. § 407(a) barred the State's action, but pursued its administrative action.

The Appeals Council remanded the matter to a second Administrative Law Judge, who again determined that removal of Ms. Pierce was improper. Citing 20 C.F.R. § 404.2050, the ALJ held that although spending on the beneficiary's current maintenance was permissible under the guidelines, "so long as the current needs of the claimant are being met, the law does not require a spending upon support and maintenance." (J.A. 80-81.) Ms. Pierce's decision not to use Danny's benefits to "defer the cost of foster care" did not violate any of the representative payee guidelines. (*Id.* at 82.) Although DSHS filed an appeal, it abandoned the appeal once the present case was filed.

Ms. Pierce continued to serve as Danny's representative payee until his emancipation and conserved a portion of his benefits for his education. Danny Keffeler graduated from Central Washington University in June 2002.

D. PROCEDURAL HISTORY OF THIS ACTION

Danny Keffeler filed a class action complaint in the Superior Court of Okanogan County on April 18, 1995. In March 1997, the trial court certified a class consisting of:

> All foster children within the State of Washington, past, present, and future in foster care that receive [either SSA or SSI benefits] for whom the State of Washington acts or has sought to act as "representative payee."

Estate of Keffeler v. *Department of Social & Health Servs.*, 32 P.3d 267, 273 (Wash. 2001); (Pet. App. 15.)

In response to the parties' cross motions for summary judgment, the trial court ruled in favor of the class. The trial court held that DSHS's use of Social Security benefits to reimburse the cost of foster care violated 42 U.S.C. § 407(a) and that DSHS violated procedural due process guarantees by failing to provide notice that its sole purpose in applying to become representative payee was to secure the funds needed to reimburse the State for the cost of providing foster care. (Pet. App. 122.) The trial court enjoined DSHS from taking any action to remove a private representative payee and from using Social Security funds to reimburse costs of foster care.[13] The court also ordered DSHS to restore the Social Security benefits that had been used to reimburse foster care expenses and awarded attorney's fees. (Pet. App. 112.) The Department appealed; the Washington Court of Appeals immediately certified the case to the Washington Supreme Court.

After briefing and oral argument, the Washington Supreme Court remanded the matter to the trial court for specified findings of fact primarily relating to Washington's foster care program and DSHS's administration of the funds it receives as the representative payee of children in foster care. The trial court, after reviewing the affidavits, depositions, and stipulations submitted by the parties, entered 89 findings of fact. (Pet. App. 46 - 111.)

E. WASHINGTON SUPREME COURT'S RULING AFTER REMAND

Following two rounds of briefing and oral argument, the Washington Supreme Court held that the reimbursement practices of DSHS violated both the anti-alienation provisions

13. This provision of the injunction was not appealed.

of 42 U.S.C. § 407(a) and the requirement of 20 C.F.R. § 404.2035(a) that representative payees administer the benefits they receive in the best interest of the beneficiary. (Pet. App. 25, 28.) In holding that the State violated § 407(a), the court first reviewed the Washington statutes and regulations governing its cost recovery program and the procedures followed by the State in seeking appointment as the representative payee of children in foster care. The court found noteworthy the Department's admission that it "probably" would not seek to serve as a representative payee if it could not use the benefits to reimburse foster care costs and the trial court's finding that obtaining reimbursement was the "sole purpose" of the State's application to serve as representative payee. (Pet. App. 18-19.)

The court characterized the critical issue as whether "DSHS acts as a creditor when it reimburses itself for foster care costs out of the children's Social Security entitlements," in contrast to the State's contention that its actions were those of a representative payee properly using the benefits to pay for the child's current maintenance. (*Id.* at 19-20.)

The court concluded that Washington's statutes and regulations created a debtor-creditor relationship between the State and children in foster care.

> As DSHS presently conceptualizes the matter, RCW 74.13.060 (and its implementing regulation, former WAC 388-70-069) requires it to reimburse itself for the public assistance it has meted out to foster children from money, including SSA entitlements, that come into the children's possession. If the Legislature and DSHS did not hold the costs of foster care were somehow "owed" back to the taxpayers, it would not claim the right of DSHS to "reimburse" itself on the taxpayer's behalf.

(*Id.* at 27.)

The "facial logic" of the reimbursement scheme required by Washington law, the court held, demonstrated "a creditor relationship, a relationship involving creditor-type acts, vis-à-vis foster children and their SSA benefits." (Pet. App. 20.) The court rejected the State's argument that its conduct did not violate § 407(a)'s proscription against subjecting Social Security benefits to "execution, levy, attachment, garnishment or other legal process" because it was a representative payee.

> [I]t is not DSHS's procedure to apply to become the foster children's representative payee that is under attack; rather it is DSHS's practice of reimbursing itself from the foster children's SSA benefits once it *becomes* representative payee.
>
> The difference is subtle, but the distinction is crucial. There is nothing ipso facto wrong with DSHS applying to become the representative payee for certain foster children, as § 405(j) and the SSA's accompanying regulations explicitly contemplate. We may even agree the representative payee application is not "other legal process." But it is equally clear the reimbursement process is "other legal process". . . .

(*Id.* at 24-25.) Because DSHS's reimbursement process mandates that it take the Social Security benefits of children in foster care "to reimburse itself for moneys spent on the child," the majority opinion concluded that DSHS's controlling regulations and procedures violated § 407(a). (*Id.* at 25.)

The court also concluded that DSHS's mandatory reimbursement procedures violated 20 C.F.R. § 404.2035's requirement that representative payees use the benefits they receive "in the best interests of the beneficiary." The opinion

expressed doubt that use of Social Security benefits to reimburse public assistance "is in all cases, or even some, in the best interest of the beneficiary." (*Id.* at 28.)

The court distinguished a representative payee's permissible use of the funds to provide current maintenance from Washington's mandatory reimbursement regime.

> Using this money for the care and maintenance of the beneficiary, as required under 20 C.F.R. § 404.2035(a), would indeed be in the best interest of the beneficiary, *but that is significantly different* from using the money to reimburse the state for payments it made for the care and maintenance of the foster child — especially when that payment to the state cannot be legally compelled and, moreover, could be used or conserved for other special needs for the child.

(*Id.* at 28 (emphasis added).) DSHS's reimbursement procedures, the court concluded, created an irreconcilable conflict of interest with its quasi-fiduciary duty to use the Social Security benefits in the best interest of the children. The majority then affirmed the trial court's "results" and remanded the action to the trial court for further proceedings consistent with its opinion. (*Id.* at 31.)

Three justices concurred in part and dissented in part, agreeing with the majority that DSHS's cost recovery program violated § 407(a).

> DSHS receives the [Social Security benefits] not on its own behalf, but on behalf of the beneficiaries, and is not permitted to assign pending (i.e., future) payments to the reimbursement of its expenditures on behalf of the foster children. Where an agency

> puts reimbursement to itself ahead of the best interests of the child, ignoring the policy expressed in the federal regulations to prioritize the child's special needs, it effectively transfers the payments to its own use. This transfer from the state in its role as representative payee to the state in its role as guardian of the public purse is contrary to § 407(a). Where the agency pursues that policy to the extent of double reimbursement, the conflict of interest is egregious.

(*Id.* at 38.) The concurring justices also agreed that DSHS's policies and procedures made it a creditor and created a conflict of interest between it and the children to whom it owed a fiduciary duty: the "fact that DSHS . . . puts its need for reimbursement ahead of the needs of the foster children further demonstrates the fundamental conflict between its roles as representative payee and creditor." (*Id.* at 36.) The concurrence further agreed that DSHS's practices violated federal law because of the direct conflict between the "federal mandate to give priority to the special needs of the beneficiary" and the "express policy of DSHS to conserve the expenditure of public assistance funds on foster care and thereby lighten the burden on the taxpayer." (*Id.*) The concurrence also joined the majority in condemning the State's practices of reimbursing itself for past due foster care costs (*id.*), reimbursing itself without taking into account the special needs of the beneficiary (*id.*), account sweeping (*id.* at 33), and reimbursing itself for foster care expenses already paid from parental child support and federal programs. (*Id.* at 38.)

The concurring and dissenting justices, however, characterized the majority as having held that *any* use of the Social Security benefits by DSHS, even use for current maintenance, would violate § 407(a). (*Id.* at 35.) This mistaken characterization of the majority's holding appears to have reflected an effort to define a disagreement with the majority as

to whether DSHS's reimbursement of its expenditures on items that qualified as current maintenance violated § 407(a).[14] The concurring and dissenting justices found that even though DSHS acted as a creditor when it reimbursed itself for foster care expenditures, because DSHS was a representative payee, such reimbursement was not constrained by § 407(a) so long as the expenses had been incurred for current maintenance and any special needs of the beneficiaries were satisfied first. (*Id.* at 33-34.)

While the majority had simply remanded the action to the trial court for further proceedings based on its opinion, the concurring and dissenting justices would have directed the trial court to modify the injunction to prevent "DSHS from using Social Security payments to reimburse the costs of past due foster care or other expenses not directly related to current maintenance, and to require DSHS give special needs a higher priority than current maintenance." (*Id.* at 39.)

F. PROCEEDINGS IN THIS COURT

DSHS applied for a stay of the Washington Supreme Court's mandate. After calling for and receiving the views of the Solicitor

14. To be sure, the Washington Supreme Court opened the door to the concurring and dissenting justices' mischaracterization by stating at the opening of its opinion: "We hold DSHS as representative payee violates § 407(a) when it applies Social Security benefits to the current maintenance needs of foster children. . . ." (Pet. App. 2.) The court used this same formulation in describing the issue for decision a few lines later. The court, however, never again repeats this formulation in the 36 remaining pages of its opinion, and it is clear from the entirety of the opinion that the court was focused on DSHS's reimbursement practices, not on any direct use of the actual Social Security benefits for current maintenance. The court's early formulation of the issue appears to have been in deference to the State's characterization of its reimbursement practices as being a use of the funds for current maintenance.

General, this Court granted a stay pending action on DSHS's petition for certiorari.

On March 14, 2002, DSHS filed its Petition for Writ of Certiorari asserting the question presented to be simply whether a representative payee could use Social Security payments for the "current maintenance" of the beneficiary. The Estate of Keffeler filed its opposition to the petition on April 25, 2002, asserting, *inter alia*, that there was no disagreement between the parties on the question presented as asserted in the Petition. On May 28, 2002, the Court issued an order granting the Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

DSHS comes before the Court wearing two hats. In one capacity, it serves as the administrator of Washington's foster care program. In its role as the state agency responsible for this program, DSHS administers a program that is funded by a combination of state (71%) and federal (29%) dollars to care for children who cannot safely be cared for by their parents or other relatives.

In a separate capacity, DSHS has elected to serve as the representative payee for children in foster care who receive Social Security benefits. No state or federal law compels it to do so, and the State does not become entitled to any increase in federal funding because of its election to serve.

In its capacity as a representative payee, DSHS is obligated to administer the funds it receives for the exclusive "use and benefit" of the child beneficiary and in the "best interest" of that beneficiary. It is a "trustee" with a fiduciary obligation to insure the appropriate use of the funds to serve the needs of the intended beneficiary.

Rather than administer the funds in the best interest of the beneficiaries, however, Washington has implemented a "cost recovery program" that uses the Social Security benefits to reimburse the State for costs incurred in the foster care program. The State candidly admits that cost recovery is the sole purpose of its application to serve as representative payee. This use of the funds violates § 405(j) because it is not in the best interest of the child to use the benefit to reimburse public assistance rather than to pay for current and future needs of the child. The State's program also violates section § 407(a) because it subjects the benefits to a legal process that requires, in the same manner that an assignment, lien, or garnishment would, that the benefits be used to reimburse a debt to the State.

Prior to adopting its litigation position in this case, SSA consistently required that representative payees comply with § 407(a) and act in the best interest of the beneficiary. It did not authorize use of Social Security benefits to repay public assistance unless the best interest of the beneficiary required the repayment and other current and forseeable needs of the beneficiary had been met. Although SSA contends Washington's representative payee program is compliant with §§ 407(a) and 405(j), this position cannot be squared with the plain language of these statutes or SSA's implementing regulations.

Indeed, it appears that SSA has chosen simply to ignore the deficiencies in DSHS's conduct as a representative payee. Notwithstanding even the double-dipping, reimbursement of administrative expenses, account sweeping, and reimbursement of past-due costs condemned by all of the justices of the Washington Supreme Court, SSA holds to its position that DSHS is a model representative payee. Whether SSA's refusal to confront the problems in DSHS's administration springs from a belief that, in prudence, states should be exempt from compliance or from a desire to increase federal funding of foster care, SSA should ask Congress, and not this Court, to change the law. The Washington Supreme Court's decision should be affirmed by this Court.

ARGUMENT

A. SECTION 405(j) REQUIRES DSHS TO ACT IN THE BENEFICIARIES' BEST INTEREST AND PROHIBITS SELF DEALING.

Almost from its inception, the Social Security Act has provided for a system of representative payment for Title II or SSI beneficiaries who need assistance in managing their benefits. 42 U.S.C. § 405(j); 42 U.S.C. § 1383(a)(2)(A)(ii).[15] *See* Social Security Amendments of 1939, ch. 666, § 205(j), Pub. L. No. 76-379, 53 Stat. 1360, 1371. The representative payee program is intended to "strengthen and extend the principles and objectives of the Social Security Act" and to "widen the scope and to improve the adequacy and the administration of [Social Security] programs without altering their essential features." H.R. Rep. No. 76-728, at 5 (1939).

To ensure that implementation of the payee program furthers the purposes of the Social Security Act, § 405(j) has always required that benefits paid to someone other than the beneficiary are to be used solely for the beneficiary's exclusive "*use and benefit*." Social Security Amendments of 1939, 53 Stat. at 1371 (emphasis added).[16] SSA regulations further define "use and

15. Section 405(j) authorizes the appointment of a representative payee under Title II of the Social Security Act. Appointment of a representative payee for SSI recipients is authorized under 42 U.S.C. § 1383(a)(2)(A)(ii), which mirrors § 405(j).

16. The current version of § 405(j) provides:

> If the Commissioner of Social Security determines that the interest of any individual under this subchapter, would be served thereby, certification of payment of such individual's benefit under this subchapter may be made, regardless of the legal competency or incompetency of the individual, either for direct payment to the individual, or for his or her *use and benefit*, to another individual or organization. . . .

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benefit" to mandate that a representative payee has a responsibility to "[u]se the payments he or she receives only for the use and benefit of the beneficiary in a manner *and for the purposes he or she determines, under the guidelines in this subpart, to be in the best interests of the beneficiary. . . .*" 20 C.F.R. § 404.2035; § 416.635 (emphasis added).[17]

The regulations provide that "payments . . . have been used for the use and benefit of the beneficiary if they are used for the beneficiary's current maintenance. Current maintenance includes costs incurred in obtaining food, shelter, clothing, medical care, and personal comfort items." 20 C.F.R. §§ 404.2040(a), 416.640(a). Although DSHS argues that payment of any expenses falling within the scope of current maintenance would always be appropriate, that is not so; under §§ 404.2035 and 416.635 a representative payee must also determine whether such payments would be in a child's best interest. Accordingly, § 405(j) requires the representative payee first to determine whether a benefit use is for the recipient's exclusive use and benefit, and second, to exercise discretion to use benefits in the recipient's best interest.

This analysis reveals several serious flaws in DSHS's argument that it expends the children's benefits solely on "current maintenance" and that its use of the funds is therefore permitted under § 405(j)(1)(A). First, DSHS does not use the children's benefits to provide current maintenance, but rather

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42 U.S.C. § 405(j)(1)(A) (emphasis added). The applicable regulations further clarify the role of the representative payee: "to receive benefits on behalf of a beneficiary [when the SSA] believe[s] that the interest of a beneficiary will be served by representative payment rather than direct payment of benefits." 20 C.F.R. § 404.2001(a).

17. To this end, Congress has prohibited those most likely to have a conflict of interest with the beneficiary, such as creditors, from serving as representative payee. *See* 42 U.S.C. § 405(j)(2)(C)(i).

uses them to reimburse itself for its costs of foster care. Not only is this problematic because of the nature of reimbursement, but also because many of the expenses reimbursed fall far beyond the bounds of "current maintenance." Second, the regulations require a representative payee to exercise discretion in expending benefits. Washington's cost-recovery policy, however, as reflected in its statutes, regulations, and budgeting procedures, remove any such discretion from the hands of DSHS. Lastly, even if DSHS were able to exercise discretion, the repayment of public assistance, whether as a debt or a voluntary payment of a non-debt, cannot be in a child's best interest when the child has other unmet current and future needs and will continue to be eligible for public assistance regardless of reimbursement.

1. DSHS's Cost Recovery Program Cannot Be Justified as a Use of the Benefit by a Representative Payee for "Current Maintenance."

Notwithstanding its admission that, as required by state law, it applies the Social Security benefits it receives "as reimbursement" to its foster care expenditures, DSHS defends its program as a permissible use of the benefits by a representative payee to pay current maintenance. Wash. Rev. Code § 74.13.060; (Pet. Br. 32.). To this end, DSHS argued in the Washington Supreme Court that it merely passed through the benefit to the foster family to pay for current maintenance. This argument prompted the Washington Supreme Court to remand the case to the trial court to make further findings, including whether and how the benefit is "passed through" to the foster family. (Pet. App. 43 ¶ 2(d)(iii).) DSHS ultimately had to admit that its procedures could not be characterized as a "pass through." (Pet. App. 55 ¶ 24.) Not only does DSHS's program fall short of passing through the benefits to the foster family for use to pay current maintenance, its specific features make clear that the benefits are being used to reimburse state public assistance costs and not for current maintenance of the beneficiary.

a. DSHS uses the benefits to reimburse for past care and services and to repay programmatic expenses.

DSHS's internal process of reimbursement belies its contention that the children's benefits are simply passed through to provide "current maintenance." Under DSHS's system, SSI and Title II benefits payable to the Secretary of DSHS as representative payee are deposited in the Foster Care Trust Fund Account at the State Treasurer's office. (Pet. App. 52 ¶ 17.) This account is debited two to three months later for care and services rendered in prior months by the Children's Administration. The process is one of reimbursement, not use for current maintenance.

Moreover, DSHS's definition of "reimbursable foster care expenses" indicates that many of the service codes under which DSHS claims reimbursement include a wide gamut of programmatic expenses. *See supra* pp. 7-8. DSHS incredibly asserts that no benefits are used for administrative expenses. Regardless of the label given the above expenses, it is clear that these items are not "current maintenance."[18]

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18. In its Application for a Stay, DSHS argued that it could not continue to serve as the representative payee for disabled children in foster care and perform the work needed to apply for and maintain their eligibility for SSI benefits, unless it was allowed to recoup some of its costs. DSHS argued that it expends $1.9 million dollars a year and employs 27 staff members solely for this purpose.

Congress anticipated that representative payees would incur administrative expenses and allows payees such as state or local government agencies to charge beneficiaries $25 per month or 10% of the benefit, whichever is less, as compensation for their services. 42 U.S.C. § 405(j)(4)(A)(i). If Washington and other states find the amount provided for in § 405(j)(4)(A)(i) insufficient, the solution is a legislative, not a judicial, one.

b. *At intermittent intervals, DSHS sweeps the children's accounts of accumulated benefits.*

The court found that DSHS engaged in "account sweeping," a practice that sometimes results in taking all of the Social Security funds that have accumulated to that date and applying them to all of the Department's accumulated reimbursable foster care expenses, sometimes incurred years earlier. (Pet. App. 63 ¶ 58.) The Narrative Summary of 48 Random Cases provides several specific examples of account sweeping. Nacole Blimka's account was swept twice, once on August 5, 1997 for $1,966 and again on October 15, 1997 for $983. (Pet. App. 100.) Clark Casey's account was swept on a single day in 1995 to repay $2,233 for foster care provided during the months of May, June, July, August, September, and October of 1994. (*Id.* at 101.) Jasmine Cotton's account was swept on May 8, 1996, when the State reimbursed itself $11,676 for foster care expenses dating back to April 1994. (*Id.*)[19]

The children have brought this issue to light at each stage of their briefing, and DSHS has remained silent, continuing to assert that all funds are used to pay current maintenance and that repayment is simply delayed a month due to bookkeeping. The examples cited above, however, belie this assertion and illustrate that DSHS acts as a creditor and attaches the children's benefits to repay their "debts."

c. *Double dipping – DSHS "reimburses" itself for costs paid from federal funds or already reimbursed by the child's parent.*

Further evidence that DSHS is not using the children's funds to provide current maintenance is the fact that, for many children, these very same expenses have already been paid for by federal funds or parental support.

19. The record contains numerous other examples. (*See, e.g.*, Pet. App. 63 ¶ 58.)

> Federal funds are used to pay for a portion of foster care payments to licensed foster homes and licensed group homes. During [the] 1995-1997 biennium approximately $137.8 million was spent on payments to licensed foster care homes and group homes. Approximately $34.4 million of this total budget, or about 25%, is from federal sources. . . . Of these federal monies, $13.4 million of the federal funds is from the Title IV-E program.

(J.A. 103, Affidavit of Richard Anderson, Office Chief for the Office of Federal Funding in the Division of Program and Policy for Children's Administration.) Despite receiving federal funds for at least a portion of the foster care stipend payment and other foster care costs, DSHS requires the children to repay the State for 100% of these costs. (Pet. App. 70 ¶ 88.)

Moreover, some of the children have parents who are required to pay child support to DSHS's Children's Services to cover its "reimbursable foster care expenses." (*Id.* at 68-69 ¶¶ 77-78.) DSHS receives approximately $3.25 million in child support payments each year. (*Id.* at 70 ¶ 84.) The trial court found, however, that no entry is made upon a child's DSHS Trust Fund Subsidiary Account to show any amounts received from parental support. (*Id.* at 69 ¶ 79.) The trial court further found that the head of the Trust Fund Unit has known since at least 1994 that it was failing to account for child support payments for children receiving SSI and Title II. (*Id.* at 69 ¶ 81.) Accordingly, the State likely recovers its costs twice when it uses Social Security benefits to repay foster care expenditures already paid from parental support. (*Id.* at 68-69 ¶¶ 77-80.)

DSHS offers no response to these trial court findings, all of which refute DSHS's contention that it merely uses the funds to pay "current maintenance." The use of the children's Social Security benefits to pay for programmatic costs, for past due

expenses, and for costs and services paid for by federal funds or child support payments violates § 405(j)'s "use and benefit" requirement and serves no interest, much less the best interest, of the child.

2. DSHS Is Barred by State Law from Using the Discretion Required of a Representative Payee.

Social Security regulations mandate that a representative payee exercise discretion in determining, under the guidance of the regulations, whether a payment is in the best interest of the beneficiary. 20 C.F.R. §§ 404.2035, 416.635. By contrast, Washington Administrative Code § 388-25-0210, as well as the State's budgetary practice, *require* DSHS to use the children's Social Security funds to offset the costs of foster care without regard to, or consideration of, the individual child's needs or best interest.[20] *Id.* ("The department *must* use income not exempted to cover the child's cost of care. . . .") (emphasis added). Further, although DSHS contends that there is a possibility that benefits could be used for purposes other than reimbursement, the trial court found that the Department failed to present any evidence that it "makes any regular, systematic or uniform attempt, on a monthly basis or otherwise, to determine what 'extra items' and/or 'special needs' would directly benefit the children in State foster care before applying the SSA and SSI funds, in [its] control, to reimburse" general foster care costs. (Pet. App. 59 ¶ 41.)

3. A Proper Administration of Benefits Would Require DSHS to Consider the Child's Current and Future Needs Before Contemplating Reimbursement.

In stark contrast to DSHS's practice of allocating all of a child's benefits to its own use, the examples accompanying

20. Underlying DSHS's actions is the Washington's cost recovery policy requiring the Department to conserve the expenditure of public funds and thus lighten the burden on Washington taxpayers. *See* Wash. Rev. Code § 74.20.010.

§ 404.2040 illustrate how a representative payee must exercise discretion in expending a beneficiary's funds.

One example illustrates a proper allocation of benefits for an institutionalized beneficiary. The beneficiary's brother, in his discretion as representative payee, uses Social Security benefits to purchase his brother a pair of shoes, buy him a movie ticket, and provide him with cash for the canteen, even though these expenditures reduced the amount the representative payee usually paid the institution for his brother's care. The Commissioner instructs that this is a proper expenditure for current maintenance. § 404.2040(b).[21]

This example highlights the effect a representative payee's obligation to use discretion in determining the best interest of the beneficiary has on the payment of even routine current maintenance costs. In considering his brother's personal needs before determining whether it would be appropriate to apply the monthly benefits to his brother's cost of institutional care, the representative payee complied with longstanding Social Security Rulings regarding the "best interest" obligation.

In drafting the current final rules regarding the representative payee's obligation to expend funds in accordance with the best interest of the beneficiary, SSA confirmed that § 405(j) requires that a representative payee exercise discretion in determining whether benefits should be used to pay current maintenance. The SSA explicitly rejected the suggestion that a representative payee should be required to pay for current maintenance before using benefits to fund special needs.

> We received several comments that §§ 404.2040(b) and 416.640(b) of the proposed regulations should be changed to reflect that a

21. Although this example applies to institutional care only, which does not encompass residential foster care, it is illustrative because both situations involve the provision of care by a third party.

> beneficiary's personal needs over and above the expenses incurred for his or her basic needs (room, board, and nursing care) may be paid from the beneficiary's funds only after the beneficiary's obligations to pay for his or her basic needs have been met. . . . Although we provide guidelines as to what is in the beneficiary's best interests, there is a considerable amount of discretion provided the payee. If satisfying the beneficiary's significant personal needs before paying his or her institutional charges is in the beneficiary's best interests, then the payee is performing appropriately.

47 Fed. Reg. 30468 at 30470 (1982).

As this explanation confirms, only after all of a beneficiary child's needs for current maintenance beyond that provided by foster care and other special needs have been met, would it be permissible for DSHS to consider whether repayment of foster care expenses to the State would be appropriate.[22]

22. As more than two-thirds of the members of the class suffer from a total disability and receive as a stipend from the State less than 70% of the amount the federal government has determined to be necessary for basic subsistence, it is difficult to imagine that appropriate expenditures will be hard to identify. For children receiving SSI benefits, funding the cost of tutoring; medical care in the form of prostheses, braces, wheelchairs or guide dogs; speech and language development training; summer camp with others having the same disability; mobility enhancements; and aides, for example, could bring life-long benefits. Children in foster care receiving SSA benefits also need better care, in the form of educational support, adequate clothing, more nutritious food, and better housing. Both classes of children require savings to help meet the costs they will incur when they are unceremoniously expelled from foster care on their 18th birthdays. In fact, SSA regulations provide illustrations showing that a prudent administration of benefits requires at least modest savings. *See* 20 C.F.R. §§ 404.2045; 416.635; 404.2040(a) (saving of 7% of benefit lauded even though savings reduced the amount

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Moreover, SSA guidelines make clear that a representative payee may not engage in self-dealing. According to the SSA's Guidelines for Organizational Representative Payees, an organization that serves as representative payee (defined as including "social service agencies, institutions, [or] an official of a state or local government agency") cannot reimburse itself for services that it provides to a beneficiary, even when paying for the service would otherwise be in the beneficiary's interest and even though the organization could pay someone else to provide the service. Thus, the guidelines would permit a representative payee to pay for the cost of providing a personal assistant to aid a beneficiary on a trip so long as the assistant "is not receiving any other source of remuneration from the representative payee's organization. However, if the personal assistant is an employee of the agency and on duty, the expenses should be paid by the agency." (*Social Security Representative Payment Program, Guide for Organizational Representative Payees* at E 24-25, attached hereto as Exhibit C, *available at* http://www.ssa.gov/payee/Guide/orgfaq.htm.) This example demonstrates the prohibition on self-dealing created by section 405(j), even where the payment of an expense would otherwise be allowed.

DSHS's use of the Social Security benefits it receives, first to reimburse itself for the cost of foster care services, and only secondarily to provide for other needs of the child, stands in stark contrast to the requirement that it act in the best interest of the child, eschew self-dealing and conflicts of interest, and provide, to the extent the funds permit, for the current and future well being of the beneficiary. The preferential repayment to itself of a public assistance benefit, particularly one funded

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available for current maintenance). SSA's regulations simply do not provide or suggest that a representative payee should preferentially repay itself before critically appraising the present and future needs of the child and deciding that the reimbursement payment would be in the child's best interest.

substantially by federal dollars, directly violates the State's obligations as a representative payee.

4. The Washington Supreme Court Properly Questioned Whether Repayment of Public Assistance Could Ever Be in a Child's Best Interest

While stopping short of holding that it would never be the case, the Washington Supreme Court expressed doubt about whether a representative payee should ever reimburse public assistance.[23] (Pet. App. 28.) Although DSHS has put forth conflicting propositions as to whether the children actually owe the State for the costs of their foster care, it is undisputed that the children will receive foster care regardless of their ability to repay the State. Moreover, that the children are in foster care is for the most part unrelated to their receipt of SSI or SSA benefits. Accordingly, if funds are available to reimburse debt or to pay for care provided by other sources, nothing authorizes the State to prefer itself to the many other individuals and agencies that also provide current maintenance to the child. The foster parents, for example, are obligated to provide food, clothing, shelter, and medical care to the child in the first instance, but Washington makes no effort to reimburse them for expenses they may incur in excess of the stipend. Likewise, children in foster care are likely to be the recipients of many other forms of public and charitable assistance such as free-or-subsidized breakfast and lunch, Medicaid, IDEA plans, free dental and vision care, free health department immunizations and screenings, *et cetera*. DSHS cannot, consistent with its obligations as a representative payee, always and automatically reimburse itself in preference to others who provide current maintenance to the child.

23. The Solicitor General of the United States also has previously expressed the view that as a matter of public policy there was no reason to permit a state to use Social Security benefits to reimburse public assistance. *See infra* p. 41 (quoting Brief for the United States as *Amicus Curiae* in *Philpott* v. *Essex County Welfare Bd.*, 409 U.S. 413 (1973), attached hereto as Exhibit B).

That, however, is not the intent of these funds. Unlike Title IV-B and Title IV-E funds, SSI and Title II benefits were never intended to serve as general federal funding for foster care. While DSHS and *amici* argue that a system under which some children receive greater funding than others would create inequalities in the system, Congress has already made the social policy decisions about which children will get these benefits and which ones will not. DSHS and its *amici* simply wish to substitute their policy judgments for Congress's judgments. Congress has decided to provide these benefits to *individual* children on the basis of their disability or their parent's payment into an insurance program and not to use them to subsidize a state welfare program.

B. WASHINGTON'S COST RECOVERY PROGRAM VIOLATES § 407(a).

Section 207(a) of the Social Security Act, 42 U.S.C. § 407(a), known as the "anti-alienation provision," provides that the right to receive Social Security benefits "shall not be transferable or assignable, at law or in equity," and prohibits a beneficiary's creditors from reaching benefits "paid or payable" through "execution, levy, attachment, garnishment, or other legal process . . . ." *Id.* Congress included § 407(a) in the original Social Security Act of 1935,[24] and strengthened its force in 1983 when it added § 407(b), providing that no other provision of law passed "before, on, or after" the date of the enactment of § 407(b) "may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section." *Id.*; *see* Pub. L. No. 98-21, § 335(a), 97 Stat. 65 (1983).[25]

24. Congress extended the protection of § 407 to SSI benefits when it created the SSI program in 1972. See Pub. L. No. 603, 92nd Cong., 2nd Sess. (1972), 86 Stat. 1329, § 1631(d)(1), codified at 42 U.S.C. § 1383(d)(1).

25. Section 407(b) was a response to certain bankruptcy court decisions that had held that the Bankruptcy Reform Act of 1978, (Cont'd)

The text of the Social Security Act thus forbids the diversion of benefits through the mechanism that the Department has employed in this case. By its terms, § 407 prohibits the Department from employing a "legal process" to transfer benefits in satisfaction of a debt to the Department. As all of the justices of the Washington Supreme Court recognized, Washington law makes children who receive Social Security benefits responsible for repaying the State for the cost of foster care. To obtain payment of this statutorily created debt, Washington's statutes and regulations make the Department custodian of the children's Social Security benefits and require the Department to use those funds for reimbursement, regardless of whether that reimbursement is in the best interest of the child. The Washington statutes and regulations that create this reimbursement scheme constitute a forbidden "legal process" under § 407(a). Contrary to the Department's claims, its appointment as representative payee does not exempt Washington's statutes and regulations from the strictures of § 407(a) because § 407(b) makes clear that § 405(j) does not limit the scope of § 407(a).[26]

(Cont'd)
11 U.S.C. §§ 101-1330, repealed by implication § 407(a)'s bar on the assignment of benefits. *See United States* v. *Devall*, 704 F.2d 1513 (CA11 1983) (Social Security benefits can be assigned as part of a voluntary bankruptcy proceeding.); *In re Buren*, 6 B.R. 744 (M.D. Tenn. 1980). After Congress enacted § 407(b), the Sixth Circuit reversed *In re Buren*, stating that "the legislative history [of § 407(b)] indicates without question that Congress intended to reverse decisions like those on appeal here." *In re Buren*, 725 F.2d 1080, 1087 (CA6 1984). Congress passed § 407(b) to reconfirm that Social Security benefits remain beyond the grasp of creditors, even when a beneficiary may have consented to a prohibited use. *See In re Barron*, 85 B.R. 603, 606 n.8 (Bankr. N.D. Ala. 1988).

26. The concurring and dissenting justices of the Washington Supreme Court did not consider the effect of § 407(b) when they determined that § 407(a) did not apply to representative payees to the extent the debt sought to be repaid was for current maintenance. (Pet. App. 32-37.)

The Department's practice violates § 407(a) for two additional reasons. First, § 407(a) encompasses any attempt by a creditor to compel repayment of a debt, even if repayment is accomplished by seeking appointment as a representative payee. Second, the Department violates § 407(a) by assigning all of Respondents' benefits to the State in advance of their receipt as part of its budgetary process.

1. Section 407(a) Applies with Equal Force to Representative Payees.

The Department asks this Court to rewrite, or "harmonize," § 407(a) to create an exception for itself. Specifically, the Department suggests that because a representative payee is subject to the supervision of the SSA, there is no need for courts to apply the anti-alienation provision to representative payees. (Pet. Br. at 26-27.) The Department even goes so far as to suggest that applying § 407(a) to representative payees would be "redundant" as creditors (with limited exception) cannot be appointed as representative payees under the Social Security regulations.

The text of § 407(a) contains no such limitation on its scope. It applies broadly to anyone who would seek to employ legal process to secure the payment of a debt. There is no inherent tension between this broad bar against alienation and the provisions of the statute that authorize the SSA to supervise representative payees. There is nothing redundant about a congressional decision to grant the SSA a general role of supervising representative payees within prescribed parameters while making clear that specific conduct is categorically forbidden, *i.e.*, is outside those parameters. Moreover, there is nothing like the extreme redundancy that the Court requires as a predicate for the textual reconstruction the Department urges. *See Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992). Thus, the structure of the Social Security Act does not

evince an exception to the plain textual bar on the Department's practice.

Indeed, the text and structure of § 407 itself foreclose the Department's argument. Contrary to the Department's argument that § 407(a) must be "read with" and "harmonized with" § 405(j), the language and history of § 407(b) demonstrate that the anti-alienation provision applies, regardless of any other law, unless that law explicitly mentions § 407.

Section 407(b) provides: "No other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section." Section 405(j) does not remotely refer to § 407. Following the text, then, there is no exception for representative payees.

Confirmation that § 407(b) means what it says can be found in the legislative history. The record of enactment unequivocally indicates that courts are not to construe other provisions of the law as creating exceptions to § 407(a). *See* H.R. Conf. Rep. No. 47, 98th Cong., 1st Sess. 115, 153 (1983), *reprinted in* 1983 U.S.C.C.A.N. 404, 443 (Section 407(b) "[s]pecifically provides that social security benefits may not be assigned notwithstanding *any other provision of law.*") (emphasis added); H.R. Rep. No. 25(i), 98th Cong., 1st Sess. 1, 83 (1983), *reprinted in* 1983 U.S.C.C.A.N. 219, 301 ("Your Committee's bill specifically provides that Social Security and SSI benefits *may not be assigned notwithstanding any other provision of the law. . . .*" (emphasis added)).

Beyond § 407, the structure of other Social Security laws rejects the Department's suggested exception to § 407(a). Where Congress has intended to lift § 407(a)'s protections, it has complied with § 407(b) by referring explicitly to § 407 when

limiting the application of the anti-alienation provision. *See, e.g.*, 26 U.S.C. § 6334(c) (providing that Social Security benefits are not exempt from levy for the payment of federal taxes); 31 U.S.C. § 3716(c)(3)(A)(i) (allowing administrative offset of Social Security benefits to collect on a claim by the United States); 18 U.S.C. § 3613(a) (allowing the United States to enforce a judgment imposing a fine against a person's Social Security benefits); 26 U.S.C. § 86(a)(1) (for tax purposes, gross income includes Social Security benefits); 26 U.S.C. § 871(a)(3)(A) (85% of Social Security benefits of nonresident aliens are subject to taxation as income). Accordingly, a representative payee, even if duly appointed, is still subject to the provisions of § 407(a) and can neither voluntarily assign a beneficiary's right to future benefits nor subject them to legal process. *See Ellender* v. *Schweiker*, 575 F. Supp. 590, 599 (S.D.N.Y. 1983) ("Congress' clear and stringent interpretation of the prohibition on transfer or assignment of benefits in section 207(b) further compels us to strictly interpret [407(a) to prohibit even voluntary assignments.]"). Far from harmonizing the law of Social Security, the Department's suggested exception would needlessly introduce dissonance.

2. Washington's Statutes and Regulations, Which Compel Use of Respondents' Social Security Benefits to Reimburse Foster Care Costs, Constitute "Legal Process" Forbidden by § 407(a).

This Court has repeatedly held that § 407(a) means what it says. There is no persuasive ground on which to distinguish these precedents. Again, § 407(a) prohibits Social Security benefits from being subject to "execution, levy, attachment, garnishment, or other legal process." This Court has declared that this language "imposes a broad bar against the use of any legal process to reach all Social Security benefits." *Philpott* v. *Essex County Welfare Bd.*, 409 U.S. 413, 417 (1973). In *Philpott*, the Welfare Board of Essex County, New Jersey, sued to enforce an agreement under which a Social Security beneficiary had

agreed to reimburse the state for the financial assistance received by the beneficiary. *Id.* at 415. The Court concluded that § 407(a) rendered the agreement to repay Social Security benefits unenforceable. *Id.* at 417. The Court refused to find an "implied exemption" to § 407(a) that would allow a state to recover the cost of state services from federal Social Security benefits. *Id.* at 416-17.

The Court reached the same conclusion in *Bennett* v. *Arkansas*, 485 U.S. 395 (1988), where Arkansas sued the estate of a prisoner to recover the cost of providing that prisoner care and maintenance while incarcerated. Arkansas acted pursuant to a state law that made the prisoner's estate, defined to include his social security benefits, responsible for that reimbursement. *Id.* at 396. The Court concluded that the statute conflicted with § 407(a) even though the state was reimbursing itself for the cost of providing "care and maintenance" to the prisoners. *Id.* at 397-98.

Here, the statutes and regulations which appoint the Department custodian over Respondents' Social Security benefits and which require the Department to use those benefits to repay state provided public assistance have the same purpose and effect as the practices disapproved by the Court in *Philpott* and *Bennett*. They are therefore "legal process" forbidden by § 407(a). Furthermore, because the State seeks appointment as representative payee for the sole purpose of accomplishing its reimbursement scheme, its appointment is also a violation of § 407(a).

a. The "Legal Process" at issue is the State's reimbursement scheme.

The Department argues that *Bennett* and *Philpott* do not apply because, rather than suing to gain access to Social Security benefits, here the Department voluntarily reimburses itself after being appointed representative payee, an act which relieves the

Department from having to sue to gain access to Respondents' benefits. The Department argues that its actions do not constitute "legal process" under § 407(a).

The Department points to two courts of appeals cases, *Mason* v. *Sybinski*, 280 F.3d 788 (CA7 2002),[27] and *King* v. *Schafer*, 940 F.2d 1182 (CA8 1991), and two state court cases, *C.G.A.* v. *Alaska*, 824 P.2d 1364 (Alaska 1992), and *Ecolono* v. *Division of Reimbursements of the Department of Health & Mental Hygiene*, 769 A.2d 296 (Md. App. 2001), for the proposition that "legal process" does not include the appointment of a representative payee. (Pet. Br. at 25.) The Department's argument misses the point. The legal process at issue in this case is the reimbursement scheme, created by Washington regulations and law, pursuant to which the Department is required to seek appointment as representative payee in order to reimburse the State from Respondent's Social Security benefits.[28] Although the mere act of being appointed

27. As discussed above, the Department's reliance on *Mason* is undercut by the fact that the representative payee in *Mason* was a care facility licensed under state law. Such facilities are expressly allowed to apply Social Security benefits to the costs of institutional care. 42 U.S.C. § 405(j)(2)(C)(iii)(III). Furthermore, the Seventh Circuit's opinion in *Mason* makes clear that the state hospital in *Mason* provided each beneficiary with money to pay for personal necessities before reimbursing itself. 280 F.3d at 791. The situation in Washington is completely reversed: reimbursement, rather than providing for the children's individual needs, is the Department's primary goal.

28. In their briefs, the *amici* States as well as the *amici* California counties claim that the affirmation of the Washington Supreme Court's opinion will call into question the actions of all 50 states as representative payees. As the brief of the California counties demonstrates, however, not every state uses Social Security benefits to reimburse itself for the cost of providing foster care. According to the *amici* California counties, California does not use the benefits for reimbursement. California does, however, reduce the amount of state benefits by the amount of Social Security benefits a child receives. (Brief of *Amici Curiae*, Counties of (Cont'd)

representative payee may not be "legal process" under § 407(a), the creation by state law and regulation of a mechanism by which the State is required to attach Social Security benefits for its own reimbursement is legal process.

b. Section 407(a) prohibits more than "judicial process."

The text of § 407(a) applies the anti-alienation principle to any "legal process" used to divert Social Security benefits for the payment of a debt. The United States as *amicus* seeks to evade this straightforward reading of § 407's text. Contrary to the statute's plain meaning, *amicus* argues that "other legal process" means "other judicial process" and that § 407(a) bars only court orders requiring a beneficiary to pay social security benefits to a creditor. But, "judicial" is not what the statute says and there is no reason to suppose that Congress would have said "legal" when it meant "judicial." *See Connecticut Nat'l Bank*, 503 U.S. at 253-54 ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last. . . ."); *United States* v. *Ron Pair Enters.*, 489 U.S. 235, 241 (1989) ("where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms'") (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

(Cont'd)
the State of California at 15.) The reduction of state benefits based on the receipt of federal benefits is far different from a reimbursement scheme and is not before the Court in this case. That such a program may be consistent with § 407(a) would not justify Washington's reimbursement scheme. *See Philpott*, 409 U.S. at 416 (rejecting state's argument that its reimbursement program did not violate § 407(a) because the state could have otherwise reduced the public assistance it provided by the amount of the Social Security benefits received).

If the text of § 407 were not clear enough on its face, SSA's own regulations confirm the understanding of "legal process" as not limited to judicially compelled compliance but as encompassing agency compelled compliance with a demand for payment of a debt. SSA defines "legal process" as "the means by which a court (*or agency or official authorized by law*) compels compliance with its demand, generally by court order." POMS GN 02410.001(B)(2) (emphasis added). Here, the Department, as a government agency, obtains reimbursement by seizing Respondent's benefits as it is authorized to do by Washington law. That the Department has been appointed representative payee does not change the fact that the Department takes Respondents' benefits in order to pay a debt.

Judicial opinions provide additional confirmation of this understanding of "legal process." As the Ninth Circuit stated in *Crawford* v. *Gould*, 56 F.3d 1162 (CA 9 1995), § 407(a) "was not designed to preclude use of only the judicial process to obtain Social Security benefits. Rather, § 407(a) is designed 'to protect social security beneficiaries and their dependents from the claims of creditors.'" *Id.* at 1166 (quoting *Fetterusso* v. *New York*, 898 F.2d 322, 327 (CA2 1990)). *See Nelson* v. *Heiss*, 271 F.3d 891, 895 (CA9 2001) (holding that nearly identical anti-alienation provision regarding veterans' benefits prevented prison officials from using benefits deposited into prison trust account to satisfy overdrafts); *Tom* v. *First Am. Credit Union*, 151 F.3d 1289, 1292 (CA10 1988) (holding that bank could not apply extra-judicial setoff remedy to Social Security benefits held in deposit account); *Brinkman* v. *Rahm*, 878 F.2d 263, 265 (CA9 1989) (§ 407(a) prohibits deductions from trust accounts even where the state does not obtain a court order); *Tidwell* v. *Schweiker*, 677 F.2d 560, 568 (CA7 1982) (§ 407(a) prohibits state mental health institutions from taking benefits without voluntary consent); *Ellender* v. *Schweiker*, 575 F. Supp. 590, 597-600 (S.D.N.Y. 1983) (rejecting Social Security Administration's contention that § 407(a) did not prevent voluntary assignments of Social Security benefits).

If creditors like the State of Washington could avoid § 407(a) and obtain repayment of debts simply by being appointed representative payee, then § 407(a) would "enable the state to obtain Social Security benefits through procedures that afford less protection than judicial process affords." *Crawford*, 56 F.3d at 1166. Such a result would be inconsistent with the purpose of § 407(a), which was to ensure that beneficiaries, rather than creditors, have a prior right to Social Security benefits.

The concurring opinion in *Rose* v. *Rose*, 481 U.S. 619 (1987) is not to the contrary, despite the suggestion of the United States. The context of the opinion makes clear that the opinion suggests only that "legal process" *includes* "judicial process." *Id.* at 642-43. The opinion does not suggest that "legal process" is limited to judicial process.

c. *Section 407(a) prohibits Washington's scheme to reimburse the cost of providing state mandated public assistance.*

In *Philpott* and *Bennett*, the Court struck down as violations of § 407(a), attempts by New Jersey and Arkansas to force Social Security beneficiaries to repay public assistance, in the form of welfare payments and food, shelter and housing, respectively. Here, the Department likewise uses Respondents' Social Security benefits to reimburse the State for the cost of providing public assistance in the form of foster care. Just as § 407(a) prohibited the attempts of New Jersey and Arkansas to recoup the cost of providing public assistance, § 407(a) likewise bars Washington's reimbursement scheme.

The Department argues that because it executes its reimbursement scheme in its capacity as representative payee, neither *Philpott* nor *Bennett* applies. The Department's limited understanding of § 407(a), however, cannot be reconciled with the Court's holdings in *Philpott* and *Bennett* that a state cannot

use Social Security benefits to reimburse public assistance payments, even if those payments are used to provide care and maintenance.

Washington's reimbursement scheme is designed to have the same effect as the reimbursement schemes held unconstitutional in *Philpott* and *Bennett*: the goal is to use Social Security benefits in order to reimburse the State for the cost of meeting its statutory obligation to provide public assistance. In its brief before this Court in *Philpott*, the Solicitor General explained why § 407(a)'s prohibition on such repayments does not put the State in any worse position than it would ordinarily be in:

> Under the New Jersey statute, the State had no choice but to provide financial disability assistance when . . . the State determined that [the SSI beneficiary] was disabled and had not other income. In these circumstances, [the State] was required to pay him an amount equal to his need . . . .
>
> The Board, therefore, . . . was performing its statutory responsibilities to aid all disabled indigents without regard to future recoupment. Thus, no unfairness would result if the State were not permitted to reach [the beneficiary's] benefits. The result of denying the State that right is to place it in the same position with respect to [the beneficiary] as it occupies with respect to what probably are the great majority of the recipients of State disability aid, from whom the State is unable to obtain reimbursement.

(Brief for the United States as *Amicus Curiae*, *Philpott* v. *Essex County Welfare Bd.*, 409 U.S. 413 (1973), attached hereto as Exhibit B.)

Like New Jersey, Washington's statutes require the State to provide public assistance (in the form of foster care) to the needy. Like New Jersey, Washington's statutes require the State to provide such aid regardless of the State's ability to obtain reimbursement. Like New Jersey, Washington seeks to obtain reimbursement from the Social Security benefits of those it provides with public assistance. That Washington has chosen to accomplish its reimbursement program by having itself appointed representative payee does not change the fact that the statute pursuant to which the State acts as representative payee "unambiguously allows the State to attach [Social Security] benefits." *Bennett*, 485 U.S. at 397. As discussed above, Washington's mandatory cost recovery regime is "legal process" under § 407(a), and therefore unconstitutional under the Supremacy Clause of the Constitution.

As this Court held in *Philpott*, there is "no reason why a State, performing its statutory duty to take care of the needy, should be in a preferred position as compared with any other creditors." 409 U.S. at 416. The State of Washington cannot establish itself as a "preferred creditor" and take a child's Social Security benefit for its own repayment before other needs of the child are met. It must stand as any other creditor and can be repaid only when such repayment would be in the best interest of the child.[29]

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29. Washington's reliance on *Mellies* v. *Mellies*, 815 P.2d 114 (Kan. 1991), and *In re the Guardianship of Nelson*, 547 N.W.2d 105 (Minn. Ct. App. 1996), to justify its conduct is misplaced. These cases stand solely for the undisputed proposition that a representative payee may use benefits to provide for a beneficiary's current maintenance. Neither case involved a creditor reimbursement scheme or a failure to act in the best interest of a child.

3. The Department Violates § 407(a) When It Assigns Respondents' Social Security Benefits to Reduce the Cost of Providing Foster Care in Washington.

As discussed in Part A, each year, as part of its budgetary process, the Department reduces it budget request by the total amount of Social Security benefits it expects to receive as representative payee. (Pet. App. 55, ¶¶ 22, 23.) The Department only rarely uses Respondents' benefits for anything other than reimbursement, as any use of Social Security benefits for anything other than reimbursing the Department's foster care expenditures necessarily causes the Department to exceed its budget. This advanced allocation of the beneficiaries' future payments to the State's foster care budget is an unlawful assignment of the beneficiary's right to future payments.

Section 407(a) prohibits such an assignment, even if made voluntarily. *See Ellender* v. *Schweiker*, 575 F. Supp. 590, 598-99 (S.D.N.Y. 1983) ("Permitting OASDI recipients to voluntarily transfer their benefits . . . to the Government creditor is not in the spirit of protection and care mandated by the statutory framework."); *see also Boulter* v. *Boulter*, 930 P.2d 112, 114 (Nev. 1997) ("Moreover, the fact that the property settlement agreement [assigning future benefits] was entered into voluntarily by the parties is without relevance. . . . If voluntary assignments and transfers of future benefits were allowed, the 'security' aspect of the Social Security program would frequently be jeopardized."). Accordingly, while the Department may attempt to argue that the assignment is voluntary because, as representative payee, it is acting on behalf of the foster children, DSHS's actions are barred by § 407(a)'s prohibition of voluntary and involuntary further assignments and transfers alike.

C. THE POSITION ADVANCED BY SSA IN THIS LITIGATION IS NEWLY CRAFTED AND IS NOT ENTITLED TO DEFERENCE

DSHS argues that judicial interpretation of § 405(j) and § 407(a) is unnecessary because the Commissioner has appropriately determined that (1) § 407(a) does not apply to representative payees and (2) payment of current maintenance costs[30] is permissible even when that maintenance would otherwise be provided by the State at no charge.

Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the first question for a court reviewing an agency's construction of a statute that it administers is "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. As to whether representative payees are exempt from the mandates of § 407(a), Congress has addressed the issue, and answered the question in the negative when it enacted § 407(b).

As to the second issue, DSHS contends that two Social Security Rulings from the 1960s, Ruling 66-20,[31] and Ruling 68-18,[32] establish that payment of a beneficiary's costs of care, even when that care is otherwise provided regardless of the beneficiary's ability to pay, is an appropriate expenditure. These Rulings, however, are inapposite. First, the Rulings address direct payment of current maintenance costs, not reimbursement, and definitely not a state-mandated cost recovery

30. Neither of the rulings cited by DSHS addressed a system of reimbursement, but instead dealt with the direct payment of current maintenance costs.

31. Social Security Ruling 66-20, 1960-74 Soc. Sec. Rep. Ser. 385, 1966 WL 3055 (S.S.A.).

32. Social Security Ruling 68-18, 1960-74 Soc. Sec. Rep. Ser. 516, 1968 WL 3918 (S.S.A.).

program. Second, they instruct that even direct payment of such costs is not authorized unless it is in the best interest of the beneficiary.

In Ruling 66-20, the issue was whether it was proper for the representative payee to use benefits to pay for institutional care costs. The institutional costs were, at that time, classified as "current maintenance," if there was a "customary charge." The Ruling found that the charges were customary only if payment could be legally compelled. If the recipient's estate was not liable for the costs of care, then the charge was not for "current maintenance" as the Commissioner had defined the term.

There, state law made the beneficiary liable for the costs of care, and so the Commissioner allowed the payee to make the payment of $50 per month to the institution. Here, it does not. (*See* Brief for the United States as *Amicus Curiae* at 24; Pet. Br. 41 ("the Department does not send a bill to the child for the additional amount of un-reimbursed foster care—as would be appropriate in an actual creditor/debtor relationship")). If Ruling 66-20 has any application to this case, therefore, it is that DSHS should not exercise discretion to repay current maintenance expenditures in the absence of an enforceable legal obligation to do so.

The Department cites Ruling 68-18 for the principle that institutional care costs, paid by public assistance, should be preferred to other needs of the beneficiary. The institutionalized beneficiary's son argued that he, as the representative payee, could prefer payment of his mother's mortgage payment and a bank note to payment of institutional cost, which he argued, would be provided by public assistance. The Commissioner determined, however, that the beneficiary did not qualify for public assistance for the total cost of her care because, to the extent she had Social Security income, she was not deemed "needy." The Commissioner ruled that the mother's need for

current maintenance enjoyed higher priority than debt repayment, which benefited only the representative payee. As applied to the Washington foster children, this Ruling instructs that debts cannot be paid until current and reasonably foreseeable needs of the children are met, especially where debt repayment benefits the representative payee and not the beneficiary.

These Rulings simply do not support DSHS's position. Even if they did, they would not be entitled to deference under *Chevron*, as they are merely ruling letters that, like the Customs ruling letters in *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), "respond to transactions of the moment, . . . are not subject to notice and comment before being issued, may be published but need only be made 'available for public inspection,' . . . and, at the time this action arose, could be modified without notice and comment under most circumstances." *Id.* at 223. Rather, they are entitled to deference only in accordance to their persuasiveness. *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944).[33]

Lastly, Petitioner and *amici* argue that the Commissioner has expressed her approval of DSHS's practices by conducting audits of the representative payee program for foster children in Washington and other states and finding that the programs were in compliance and by supporting Petitioner's position in this litigation. (Pet. Br. at 31-32 n.15; Brief of Children's Defense Fund, *et al.*, as *Amici Curiae* at 17; Brief of the States of Florida, Alabama, *et al.*, as *Amici Curiae* at 14-16.) There is simply no authority for DSHS's argument that a Social Security Administration audit—the position of an individual employee as to an individual representative payee program and intended in no way to be an assertion of agency policy—is entitled to

33. Moreover, to the extent these Rulings support Petitioners, they are superceded by the more recent guidance and Administrative Law Judge determinations cited by Respondents. *See supra* 10-11, 26-30.

Chevron deference. *See Mead Corp.*, 533 U.S. at 220 ("'interpretations contained in policy statements, agency manuals, and enforcement guidelines'" are "beyond the *Chevron* pale"). To the contrary, the audit, a three page "trip report" that failed to provide any analysis of the resources or needs of individual children, is entitled to no deference at all. *See National R.R. Passenger Corp. v. Morgan*, 122 S. Ct. 2061, 2071 n.6 (2002) (Interpretive guidelines "are 'entitled to respect' under our decision in *Skidmore v. Swift & Co.* . . . , but only to the extent that those interpretations have the 'power to persuade.' *Christensen v. Harris County*, 529 U.S. 576, 587 . . . (2000).").

While litigation positions may be entitled to *Skidmore* deference, the deference is limited, particularly when the agency's interpretation is "advanced for the first time in a litigation brief." *Mead Corp.*, 533 U.S. at 228. In *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 212-13 (1988), this Court addressed a similar situation where an agency advanced a position in litigation that was unsupported by any established regulations or rulings, stating:

> We have never applied the principle of those cases to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice. To the contrary, we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, on the ground that "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands."

Id. (quoting *Investment Co. Inst.* v. *Camp*, 401 U.S. 617, 628 (1971)).

Accordingly, the fact that the Commissioner, through the Solicitor General, is participating in this litigation in support of the Department does not establish that DSHS's actions are in accordance with established Social Security regulations or rulings. At the least, the question of whether a representative payee must repay the costs of care otherwise provided at no cost to the foster children is unanswered by agency regulations, and at the most, the Rulings put forth by the Department indicate that DSHS's actions are improper. That the Commissioner has now taken a contrary position in its litigation brief is simply of no significance.

CONCLUSION

Based upon the record before it, the Washington Supreme Court concluded that the State's administration of foster children's benefits violated both the letter and spirit of § 405(j) and § 407(a). A State may not use the representative payee program to obtain custody of funds and then use those funds for cost-recovery rather than in the best interest of the beneficiary. Because the Washington Supreme Court determined that DSHS's use of benefits was a cost-recovery program, and not an expenditure for current maintenance in the best interest of the individual child, its decision should be affirmed.

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EXHIBIT A — "T-LIST" OF REIMBURSABLE EXPENSES

TRSTFUND MAINTAIN TRUST FUND TABLE TRSTFUND TRSTLST

Sel	Srvc	Sel	Srvc	Sel	Srvc	Sel	Srvc
	2801		2804		2805		2807
	2808		2810		2826		2827
	2828		2829		2830		2831
	2832		2833		2834		2835
	2836		2837		2838		2873
	2874		3101		3104		3114
	3115		3201		3202		3203
	3210		3211		3212		3216
	3217		3218		3219		3223
	3224		3225		3232		3233
	3234		3235		3301		3302
	3406		3410		3412		3415
	3418		3423		3425		3433
	3435		3441		3442		3443
	3444		3447		3448		3450

Options: C = Create R = Review U = Update D = Delete

E2

Exhibit A

TRSTFUND MAINTAIN TRUST FUND TABLE TRSTFUND TRSTLST

Sel	Srvc	Sel	Srvc	Sel	Srvc	Sel	Srvc
	3452		3453		3454		3455
	3456		3457		3458		3459
	3460		3461		3462		3470
	3476		3477		3494		3495
	3901		3902		4940		92801
	92804		92805		92807		92808
	92810		92826		92827		92828
	92829		92830		92831		92832
	92833		92834		92835		92836
	92837		92838		92873		92874
	93101		93104		93114		93115
	93201		93202		93203		93210
	93211		93212		93216		93218
	93219		93223		93224		93225
	93232		93233		93234		93235

Options: C = Create R = Review U = Update D = Delete

TRSTFUND MAINTAIN TRUST FUND TABLE TRSTFUND TRSTLST

SSel	Srvc	Sel Srvc	Sel Srvc	Sel Srvc
93301	93406	93410	93412	
93415	93418	93423	93425	
93433	93435	93441	93442	
93443	93444	93447	93448	
93450	93452	93453	93454	
93455	93456	93457	93458	
93459	93460	93461	93462	
93476	93477	93494	93495	
93901	93902	94940		

Options: C = Create R = Review U = Update D = Delete

EXHIBIT B — BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

No. 71-5656

IN THE SUPREME COURT OF THE UNITED STATES

DORIS PHILPOTT, ET AL., PETITIONERS

v.

ESSEX COUNTY WELFARE BOARD

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

EDWIN N. GRISWOLD,
Solicitor General,

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Deputy Solicitor General,

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Exhibit B

[Index and Table of Citations Omitted]

Exhibit B

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-5656

DORIS PHILPOTT, ET AL., PETITIONERS

v.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey is reported at 59 N.J. 75, 279 A.2d 806 (Pet. App. A). The opinion of the Appellate Division is reported at 109 N.J. Super. 48, 262, A.2d 227. The opinion of the trial court is reported at 104 N.J. Super. 280, 249 A.2d 639.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on July 12, 1971. On October 6, 1971, Mr. Justice Brennan extended the time for filing a petition for a writ of

Exhibit B

certiorari to November 8, 1971. The petition was filed on November 1, 1971, and was granted on May 15, 1972. The jurisdiction of this Court rests on 28 U.S.C 1257(3).

QUESTION PRESENTED

Whether Section 207 of the Social Security Act, which prohibits attachment of federal old-age, survivors, and disability insurance benefits, bars a state from attaching federal disability insurance benefits retroactively paid to a beneficiary and deposited by his trustee in a bank account containing no other funds.

STATUTE INVOLVED

Section 207 of the Social Security Act, 49 Stat. 624, as amended, 42 U.S.C. 407, provides in relevant part:

> * * * [N]one of the moneys paid or payable or rights, existing under this subchapter [relating to old-age, survivors, and disability insurance] shall be subject to execution, levy, attachment, garnishment, or other legal process * * *.

INTEREST OF THE UNITED STATES

Section 223 of the Social Security Act provides for payments of federal disability insurance benefits to alleviate the financial burdens of permanent and total disabilities. Section 207 of the Act protects against frustration of the purpose of these payments by ensuring that the benefits paid will remain available to the disabled beneficiary. The United

States has a substantial interest in this case, since its outcome will affect the extent to which the beneficiaries of federal disability insurance will have the full use of payments made under the Act.

STATEMENT

The State of New Jersey has established a program of financial assistance for persons who are permanently and totally disabled, based upon need. Under this program, the level of benefits is fixed by first determining the amount needed by the beneficiary reasonably to maintain himself and then subtracting from that amount of the beneficiary's actual income from other sources (Pet. App. A, 5). As a condition of receiving assistance, a beneficiary is required to execute an agreement to reimburse the county welfare board, which administers the program, for all payments received thereunder (Pet. App. A, 6). The purpose of this agreement is "to enable the board to obtain reimbursement * * * out of subsequently discovered or acquired real and personal property of the recipient" (*ibid.*).

Petitioner Wilkes applied to respondent county welfare board for assistance under this program in 1966, and he executed the required agreement (Pet. 3). After determining Wilkes' monthly maintenance needs to be $108 and finding that he had no other income, respondent fixed his monthly benefits at that amount and began making assistance payments no later than January 1, 1967 (Pet. App. A, 5). The payments would have been less if Wilkes were receiving federal disability insurance benefits under the Social Security Act, and respondent advised Wilkes to apply to the Social Security Administration for such benefits. (Pet. 3).

In August 1968, Wilkes was awarded retroactive federal disability insurance benefits under Section 223 of the Social Security Act, 42 U.S.C. 423, from May 1966 through June or July 1968 (Pet. App. A, 7). These benefits were calculated on the basis of $69.60 per month for 20 months and $78.70 per month for 6 months, for a total of $1864.20 (*ibid*). A check for that amount was issued to Wilkes (Pet. 4.). Petitioner Philpott, acting as trustee for Wilkes, deposited the check in a bank account (Pet. App. A, 2). The amount of the check constituted the entire balance in this account (*ibid.*).

Respondent immediately brought suit to reach the bank account under the agreement to reimburse (*ibid.*). The trial court held that respondent was barred by Section 207 of the Social Security Act, 42 U.S.C. 407, from recovering any amount from the account (Pet. App. A, 3), and the Appellate Division affirmed (*ibid.*).

The Supreme Court of New Jersey reversed, holding that Section 207 does not bar attachment of the federal payment by respondent under the circumstances of this case. The court stated that the fund attached did not represent current benefits necessary for Wilkes' current support, that the monthly payments which had been made by respondent would have been reduced on account of the federal benefits had they been received concurrently, and therefore that "[t]he equities are all with [respondent]" (Pet. App. A, 11). The court further reasoned that the rationale of Section 204 of the Act, 42 U.S.C. 404, which permits recovery by the federal government in cases of overpayment, should be extended to permit recover by respondent here, because the federal

government contributes one-half of the funds for assistance under the state program and will be entitled to one-half of any recovery in this suit (Pet. App. A, 9-10, 11-12). The court also stated that similar state claims had been honored under the federal veterans' benefits laws (Pet. App. A, 13-14).

Since respondent did not claim a right to the entire federal payment but only to the amount by which its own payments would have been reduced had the federal benefits been received currently rather than retroactively (Pet. App. A, 2, n. 2), and because the stipulated facts were ambiguous as to when respondent actually began making assistance payments (Pet. App. A, 3, n. 3), the court remanded the case for a determination of the period of overlap and the precise amount of respondent's claim (Pet. App. A, 14).

ARGUMENT

SECTION 207 OF THE SOCIAL SECURITY ACT BARS THE RESPONDENT FROM OBTAINING THE RETROACTIVE FEDERAL DISABILITY INSURANCE BENEFITS PAID TO THE BENEFICIARY AND DEPOSITED IN A BANK ACCOUNT.

Introduction and Summary

This case presents a difficult question of statutory interpretation. On its face, Section 207 of the Social Security Act appears to bar the State of New Jersey from obtaining the federal disability insurance paid retroactively to Wilkes. The language is sweeping and unqualified: "none of the moneys paid or payable under this subchapter shall be subject

to execution, levy, attachment, garnishment, or other legal process."[1] The amount paid to Wilkes as retroactive benefits was "moneys paid * * * under this subchapter," and the suit the state brought to reach this money in the bank account was an attempt to "subject [it] to * * * levy, attachment * * * or other legal process." The statute, therefore, appears to bar the state's attempt to obtain this money.[2]

1. There is only exception to the sweeping exemption of Section 207, and that arises under another statutory provision. Section 6331(a) of the Internal Revenue Code of 1954, 26 U.S.C. 6331(a), makes subject to levy for federal tax liability "all property and rights to property" of the person liable for the tax. Section 6334 of the Code, 26 U.S.C. 6334, limits exemptions form the levy to eight specific categories and provides that no other property or rights to property shall be exempt "[n]otwithstanding any other law of the United States." Both the Treasury Department and the Department of Health, Education, and Welfare recognize, accordingly, that social security benefits may be subjected to levy under the foregoing sections.

2. Except for the court below in the present case, we know of no state court of last resort that has permitted attachment of social security benefits either paid or payable.

The case most in point, *Century Indemnity Co.* v. *Mead*, 121 Vt. 434, 159 A. 2d 325, held that Section 207 bars attachment by a judgment creditor not only for future social security payments but also of a bank account in which past social security payments had been deposited. *Ponath* v. *Hedrick*, 22 Wis. 2d 382, 126 N.W. 2d 28, held that under state law social security benefits are not includable as income in determining an individual's ability to pay for the support of a dependent relative; the court also held, however, that Section 207 did not preclude treating such benefits as income. The Texas Court of Civil Appeals, an intermediate appellate court, relied upon *dicta* in the two federal cases that have considered the

(Cont'd)

The law, however, frequently has declined to give broad and unqualified language and principles their full sweep when to do so would produce unfair or unjust results. Even such words as "none" and "no" do not always mean what they say.[3] And in the case of spendthrift trusts, whose very purpose is to protect a beneficiary against his own improvidence by preventing his creditors from reaching rights under the trust, creditors who supply necessaries to the beneficiary have been permitted to recover therefor from the trust. See A.L.I Restaurant, *Trusts*, Section 157(b). Thus this Court should not assume that Congress imposed an absolute bar upon the attachment of retroactively paid social security moneys in any circumstances, merely because of the sweeping language of Section 207, if that results does not comport with the proper effectuation of the purposes and policies of the Social Security Act.

The legislative history of Section 207 provides no guidance in the resolution of this problem. The substance of

(Cont'd)
Section (*Beers* v. *Federal Security Administrator*, 172 F. 2d 34 (C.A. 2), and *Ewing* v. *Gardner*, 185 F. 2d 781 (C.A. 6), reversed on other grounds, 341, U.S. 321, both discussed in footnote 6, *infra*, p. 13) in permitting a creditor to reach accumulated survivors insurance benefits held by a guardian of minor children. *Texas Baptist Children's Home of Round Rock* v. *Corbitt*, 321 S.W. 2d 610.

3. *E.g.*, *Miller* v. *Standard Nut Margarine Company of Florida*, 284 U.S. 498 (interpreting the predecessor of Section 7421 of the Internal Revenue Code of 1954, 26 U.S.C. 7421(a), which provided flatly that "[n]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," as nevertheless being subject to exception in cases of "extraordinary and exceptional circumstances").

the present language of Section 207 has been in the Social Security Act since it was first enacted in 1935.[4] The Committee reports on this provision merely paraphrase the language of the statue itself. H. Rep. No. 615, 74th Cong., 1st Sess., 21; S. Rep. No 628, 74th Cong., 1st Sess., 32. Similarly, when Congress reenacted this provision in the Social Security Amendments of 1939, the Committees stated that the provision "provides that a right to payment under this title shall not be transferable or assignable nor shall any moneys paid or payable be subject to execution or other legal process." H. Rep. No. 728, 76th Cong., 1st Sess., 45; S. Rep. No 734, 76th Cong., 1st Sess., 53.

Since the provision protected against the attachment of "moneys paid * * * under this title," it automatically covered new social security programs as they were enacted, without the necessity of explicit Congressional action. Thus, when the program of federal disability insurance was established by the Social Security Amendments Act of 1956, P.L. 880, 70 Stat. 807, payments thereunder also came under the protection of Section 207.

A fair reading of this history, we believe, suggests that in Section 207 Congress endeavored to protect social security beneficiaries from having their payments subjected to creditors' claims, but that it did not indicate any views with respect to whether particular exceptional circumstances might justify exceptions to this broad provisions. Congress did not intend creditors to be able to satisfy their claims out of social security benefits. The purpose of the federal disability

4. The prohibition against attachment was originally contained in Section 208 of the Social Security Act of 1935, 49 Stat. 620, 625.

insurance program was to provide benefits to individuals who are seriously disabled and unable to work, and to their dependents, and thereby to alleviate the financial burdens of disability, including "the heavy weight of increased medical and hospital bills, nursing services and drugs, the loss of [the disabled individual's] regular income, and the continued financial responsibility for the support of his wife the education and care of his children." 102 Cong. Rec. 13037 (1956). The provision in Section 207 that "none of the moneys paid * * * shall be subject to * * * legal process" guards against frustration of this basic purpose by insuring that moneys designed for these vital purposes are used for those objectives and not diverted to meet the claims of creditors. Accordingly, if exceptions are to be created to the sweeping language of Section 207, the must be consistent with the foregoing purpose.

Assuming that Section 207 may admit of exceptions in special circumstances, the question in this case is whether the circumstances under which the State of New Jersey provided Wilkes with necessary support during the period when he was not receiving federal disability insurance payments entitles the State to reach those payments when retroactively made. Although the question is not free from difficulty, it is our conclusion that Section 207 bars the State from obtaining the money. It is our argument that the equitable considerations upon which the State relies are not sufficiently compelling to justify an exception here; that the fact that the moneys have been deposited in a bank account does not warrant a different result; and that Section 204 of the Act, which permits the Secretary to recover overpayment

of benefits and on which the Supreme Court of New Jersey apparently relied, does not support the State's attachment of the federal payments. We discuss each of these points in turn.

A. The Equitable Considerations Upon Which the Supreme Court of New Jersey Relied Do Not Justify Permitting the State to Obtain the Federal Disability Insurance Benefits Paid to Wilkes.

In holding that the respondent Board could reach the federal disability insurance payments made to Wilkes, the Supreme Court of New Jersey pointed out that the Board had provided Wilkes with necessary funds for this support during the period when he was not receiving federal payments; that, as shown by the subsequent retroactive award of the payments, he was entitled to them during that period; that is Wilkes had currently received the federal payments to which he was entitled, the State's payments to him would have been smaller; and that the retroactive federal payment was not necessary for Wilkes' current support.[5] Although these are appealing considerations, we do not believe that they are sufficient to fit within any justifiable exception to the unqualified language of Section 207, particularly in favor of a State.

Under the New Jersey statute, the State had no choice but to provide financial disability assistance when, upon the

5. There is nothing in the record that supports the latter statement. The record does not show Wilkes' medical expenses or general financial condition. The retroactive payment may have been necessary to meet his current living expenses, in whole or in part, including special needs arising from his disability.

filing of Wilkes' application for assistance in 1966, the State determined that he was disabled and had no other income. In these circumstances, it was required to pay him an amount equal to his need. Although the State required Wilkes to execute a reimbursement agreement, its purpose was "to enable the Board to obtain reimbursement * * * out of subsequently discovered or acquired real and personal property of the recipient" (Pet. App. A, 6).

The Board, therefore was not volunteering any funds or services as an act of mercy or aid to help Wilkes, but was performing its statutory responsibilities to aid all disabled indigents without regard to future recoupment. Thus, no unfairness would result if the State were not permitted to reach Wilkes' benefits. The result of denying the State that right is to place it in the same position with respect to Wilkes as it occupies with respect to what probably are the great majority of the recipients of State disability aid, from whom the State is unable to obtain reimbursement. The fact that Wilkes executed a formal reimbursement agreement should not make any difference; despite that agreement, we think that the State should be in no better position than an ordinary creditor, and Section 207 precludes creditors generally form obtaining social security payments.

Indeed, any hardship the State might be thought to suffer from this result is substantially diminished by the fact that a portion of any recovery it might obtain would inure to the benefit of the federal government. As the Supreme Court of New Jersey recognized, since the federal government provides one-half of the funds for assistance under the New Jersey program of disability relief, "the state, upon recovery

of any amount by way of reimbursement, must account to the federal government for the latter's share in the same proportion as it was contributed." (Pet. App. A, 10).

B. Section 207 Covers Federal Benefits That Have Been Deposited in a Bank Account After Payment.

The fact that the moneys paid to Wilkes have been deposited in a bank account does not remove the moneys from the protection of Section 207. That section bars attachment of a bank account constituting the proceeds of a check made in payment of disability insurance benefits. *Century Indemnity Co.* v. *Mead*, *supra*. The statue expressly covers "money paid"[6] and it prohibits "execution, levy, [and] attachment," legal processes which, unlike garnishment, relate to assets in hand rather than to rights to future payments. Furthermore, protection of social security benefits deposited in bank accounts is necessary for full effectuation of the Congressional intent that payments be insulated from creditors and remain available to beneficiaries.

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6. Despite this language, two courts of appeals have expressed in *dicta*, the brief that the section covers only future payments. *Beers* v. *Federal Security Administrator*, 172 F. 2d 34 (C.A. 2); *Ewing* v. *Gardner*, 185 F. 2d 781 (C.A. 6), reversed on other grounds, 341 U.S. 321. Those cases involved efforts by personal representatives of deceased beneficiaries to recover the unpaid benefits which were accrued at the date of death; Section 207 was inapplicable because the property rights in question had passed to the representative by operation of law and were not being made subject to "execution, levy, attachment, garnishment, or other legal process * * *."

This Court has reached the same conclusion in a series of cases involving veterans' benefits exemption statutes. In *Porter* v. *Aetna Casualty Co.*, 370 U.S. 159, the Court summarized (at 160-161) its decisions:

> Since 1873 it has been the policy of the Congress to exempt veterans' benefits from creditor actions as well as from taxation. In 1933 in *Trotter* v. *Tennessee*, 290 U.S. 354, the Court * * * held that the exemption spent its force when the benefit funds "lost the quality of moneys" and were converted into "permanent investments." This distinction was adopted by the Congress when the [Word War Veterans' Act of 1924] was amended * * * to provide, *inter alia*, that such payments shall be exempt "either before or after receipt by the beneficiary" but that the exemption shall not "extend to any property purchased in part or wholly out of such payments." Thereafter in *Lawrence* v. *Shaw*, 300 U.S. 245 (1937), the Court held that bank credits derived from veterans' benefits were within the exemption, the test being whether as to deposited the benefits remained subject to demand and use as the needs of the veteran for support and maintenance required. It was noted that the allowance of interest or such deposits would not destroy the exemption. [Footnotes omitted.]

The Court held in *Porter* that 38 U.S.C. 3101, which provides that veterans' "payments * * * shall be exempt from the claim of creditors, and shall not be liable to

attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary," bars attachment by a creditor of benefits deposited in a savings and loan association on behalf of a veteran, on the ground that the deposit retained the "quality of moneys" and did not constitute a "permanent investment."

The same principle is also appropriate here: the protection extended by Section 207 to "moneys paid" should remain in force as long as the payment retains the "quality of moneys" and is not converted into a "permanent investment." Under this standard, this case is governed by *Lawrence* v. *Shaw*, 300 U.S. 245, which held that the immunity afforded veterans' benefits continued after their deposit in a bank account. Here, as in both *Lawrence* and *Porter*, the funds on deposit were readily withdrawable and retained the quality of money; there is no evidence that these funds, by their mere deposit, had been transformed into a permanent investment.[7]

In reaching a contrary result, the court below cited a separate line of veterans' benefit case, dealing with the issue whether a State which has provided care and maintenance of an incompetent veteran is a "creditor" for purposes of 38 U.S.C. 3101. There decisions generally stand for the propositions that insofar as a State's claim relates to amounts expended before the appointment of a committee of an

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7. The court in *Lawrence* noted (at 250) that "deposits in bank may be made under a special agreement by which the deposits assume the character of investments and would lose immunity accordingly [but no] such agreement is show here." There has been no showing of any such special agreement in this case either.

incompetent veteran, the State is a "creditor" and therefore may not recover form benefits subsequently paid to the committee, but that the State is not a "creditor" as to subsistence charges paid after appointment of the committee and may therefore recover such amounts form the committee. *See, e.g., Savoid* v. *District of Columbia*, 288 F.2d 851 (C.A. D.C.); *District of Columbia* v. *Reilly*, 249 F.2d 524 (C.A. D.C.); *Department of Public Welfare* v. *Sevcik*, 18 Ill. 2d 449, 164 N.E. 2d 10; *In re Bemowski's Guardianship*, 3 Wis. 2d 133, 88 N.W. 2d 22; *In re Lewis' Estate*, 287 Mich. 179, 283 N.W. 21; *In re Ferarazza's Estate*, 219 Cal. 668, 28 P. 2d 670.

Those decisions seem irrelevant to the issue in this case. Unlike 38 U.S.C. 3101, the statutory provision involved here (Section 207) does not refer to "claim of creditors" but rather interposes a broad bar against the use of any legal process to reach social security benefits. The construction of "creditors" relied upon in the veterans' benefit cases, itself somewhat strained, therefore would not justify an exception to Section 207.[8]

8. As petitioners suggest (Pet. 6, n. 2) the veterans' benefits cases involve the use of current funds for the current support of an incompetent; those funds would have been used by the veteran himself or his committee for his care and maintenance if it had not been provided by the State. Those cases are thus factually distinguishable form the case here, where the State is not seeking to recover for any assistance it is currently providing and the beneficiary's trustee seeks to retain the funds for the use of the beneficiary.

C. Section 204 of the Act, Which Permits the Secretary to Recover Overpayments of Benefits, Does Not Support the State's Attachment of the Federal Payments in This Case.

The court below apparently relied in part upon Section 204 of the Act, 42 U.S.C. 404, which permits the Secretary to recover overpayments of old-age, survivors, or disability insurance benefits. This reliance is not warranted. There has been no overpayment of federal disability insurance benefits here; and the Secretary is not seeking recovery, directly or indirectly, of any such benefits. The pecuniary interest of the United States in the outcome of this case, resulting from the State's duty to remit to the United States its aliquot share of any recovery from beneficiaries (see [E15-16], *supra*), is not within the ambit of Section 204. That Section is limited to federal payments to beneficiaries and dos not apply to federal contributions to state assistance programs.

Exhibit B

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of New Jersey should be reversed.

Respectfully submitted,

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AUGUST 1972.

EXHIBIT C — EXCERPTS FROM GUIDE FOR ORGANIZATIONAL REPRESENTATIVE PAYEES

Social Security

Representative Payment Program

Guide for Organizational Representative Payees

Exhibit C

[5] **What is a representative payee?**

A representative payee is an individual or organization that receives Social Security and/or SSI payments for someone who cannot manage or direct someone else to manage his or her money. Your main responsibility as a representative payee is to use the funds to pay for the current and foreseeable needs of the beneficiary. (Refer to pages 8-9 for the duties of a representative payee.) With certain exceptions, a representative payee is **not** paid for services. However, see below for a description of certain representative payees who are authorized to collect a fee.

There are two kinds of representative payees:

1. **Individual representative payee** – This could be someone that a beneficiary lives with or a family member or friend who does not live with the beneficiary. It could also be a lawyer, a legal guardian, or a volunteer for a government or non-profit agency.

2. **Organizational representative payee** – This category includes social service agencies, institutions, an official of a state or local government agency or a financial organization. Some organizational payees, called **Fee-for-Service Payees**, are permitted to charge the beneficiary a fee for their services. The payee must file a request and be approved before they can collect a fee.

Note: Having power of attorney or a joint bank account with the beneficiary is **not** the same thing as being a representative payee.

Exhibit C

[36] **Frequently asked questions**

* * *

I am representative payee for a child who wants to go on vacation and needs one-on-one assistance. Can her funds be used to pay for her personal assistant's expenses on the trip?

Any use of the beneficiary's funds must show a correlation between the expense incurred and a direct benefit to the individual beneficiary. The use of a beneficiary's funds to pay the expenses of a personal [37] assistant may be proper if the personal assistant serves as a volunteer and is not receiving any other source of remuneration from the representative payee's organization. However, if the personal assistant is an employee of the agency and on duty, the expenses should be paid by the agency. Of course, the expense must be reasonable in relation to the beneficiary's funds and the beneficiary must not have unmet current or foreseeable needs. You must obtain SSA's approval before using the funds for this purpose.

* * * *